

# GUARANTEED ACCESS TO SAFE AND LEGAL ABORTIONS: THE TRUE REVOLUTION OF MEXICO CITY'S LEGAL REFORMS REGARDING ABORTION

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## *Abstract*

*This Article examines the revolutionary changes made to the criminal and health codes regulating abortion in Mexico City in 2007, which made it legal for a woman to obtain an abortion anytime before the twelfth week of pregnancy for any reason. These changes dramatically expanded the previous law, which had only allowed legal abortions in four limited circumstances. Additionally, this move made Mexico City the only state in Mexico to allow abortions under any circumstance for a proscribed period of time. This Article argues that the true revolution of the 2007 reforms can be found in the amended health code, which guaranteed women access to safe, legal abortions at public hospitals. Historically, even in instances where abortion was legal, it was rarely possible to access, making the right effectively meaningless. By embracing emerging trends in human rights that focus on a woman's right to health and reproductive liberty while performing a careful balancing act between the rights of women seeking abortions and doctors who conscientiously object to performing them, the Mexico City legislature lays out a model for reform for the rest of Mexico and beyond.*

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## I. INTRODUCTION

On April 24, 2007, the Asamblea Legislativa de Distrito Federal<sup>1</sup> (“Legislative Assembly of the Federal District of Mexico” or “ALDF”) reformed Articles 145 through 148 of the Criminal Code and Article 14 of the Health Code, all dealing with abortion.<sup>2</sup> The reforms were signed into law the next day by Mexico City’s Mayor, Marcelo Ebrard, a champion of liberal social causes.<sup>3</sup> These reforms dramatically altered the previous laws by legalizing abortion—in all circumstances—through the twelfth week of pregnancy.<sup>4</sup> Before this point, abortion was only legal in four situations: where the pregnancy was the result of rape, where the pregnancy would put the woman’s life at risk, where the fetus would be seriously deformed, or where the woman suffered forced artificial insemination.<sup>5</sup>

The technical right to receive a safe and legal abortion, however, was largely delinked from having actual *access* to a safe and legal abortion. Responding to the problem of access, the ALDF reformed not only the Criminal Code, but also the Health Law, to continue to expand on changes made in 2000<sup>6</sup> which sought to ensure that women who pursued safe abortions would not be thwarted by state actors opposed to abortion, or by doctors and hospitals who

1. The Federal District of Mexico is also known as Mexico City.

2. Most of the translations from Spanish in this work are my own, with the invaluable help of Edgar Villanueva, L.L.M., The George Washington University Law School. At times, I also used translations where provided by the source.

3. Hector Tobar, *In México, Abortion is Out from the Shadows: The Stigma Attached to it has Begun to Fade as Large Numbers of Procedures Have Been Done in the Capital*, L.A. Times, Nov. 3, 2007, at A1.

4. Decreto por el que se Reforma el Código Penal para el Distrito Federal y se Adiciona la Ley de Salud para el Distrito Federal (Decree that Reforms the Penal Code for the Federal District and Adds the Health Law for the Federal District), Gaceta Oficial del Distrito Federal (“GODF” or “Official Gazette for the Federal District”), 26 de Abril de 2007 (Mex.), at 2–3 [hereinafter GODF Apr. 26, 2007].

5. Código Penal para el Distrito Federal (Penal Code for the Federal District), GODF, 16 de Julio de 2002 (Mex.), at 29–30. [hereinafter GODF July 16, 2002].

6. The 2000 changes regarding access first appeared in the Criminal Code. It was not until 2007 that the Health Code was reformed to include abortion reforms. Before this point, all abortion reform was solely within the realm of the Criminal Code.

conscientiously objected to abortion.<sup>7</sup> Both prongs of the 2007 legislation were nothing short of revolutionary in Latin America. Never before had the region seen such widespread decriminalization of abortion, nor had there ever been such effective and meaningful mechanisms in place to guarantee access to legal forms of abortion. This paper posits that, inspired by evolving concepts of the right to health as a human rights imperative, Mexico City revolutionized abortion practice in Latin America by making access to safe and affordable abortions a reality.<sup>8</sup> Part II of this Article focuses on the historical backdrop to the 2007 reforms, both in Mexico and globally. It traces the evolution of abortion laws in Mexico from the codification of the Mexican Criminal Code to the creation of the historically significant Robles Law in 2000. It further outlines how the 2007 reforms substantially altered both Mexico City's criminal code and its health law and gives the international context that sets the stage for reform in Mexico. Part III analyzes the reforms through several distinct lenses. Section A explores how international action regarding abortion, including a movement for women's rights to health and reproductive liberty, both explicitly and implicitly influenced Mexico

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7 Grupo de Información en Reproducción Elegida ("GIRE"), Paulina: Five Years Later 43 (2005), available at [http://reproductiverights.org/sites/default/files/documents/bo\\_paulina5years.pdf](http://reproductiverights.org/sites/default/files/documents/bo_paulina5years.pdf) [hereinafter GIRE].

8 This paper hopes to contribute to the literature on abortion in Latin America in a number of ways. It serves as a type of case study of historical and current issues of access to abortion in Mexico City, which illuminates emerging trends in human rights, namely the right to health, as well as the right to reproductive and sexual liberty. Indeed, making access to safe abortions a part of a comprehensive health plan is becoming an increasingly critical step to securing full citizenship rights for women in the human rights context. See Alejandro Madrazo & Estefanía Vela, *The Mexican Supreme Court's (Sexual) Revolution?*, 89 Tex. L. Rev. 1863 (2011) (examining the radical expansion of sexual and reproductive rights in Mexico under recent Mexican Supreme Court jurisprudence); Hilary Hammell, *Is the Right to Health A Necessary Precondition for Gender Equality?*, 35 N.Y.U. Rev. L. & Soc. Change 131 (2011) (discussing the growing use of a right-to-health reasoning among human rights advocates to persuade states to liberalize laws regarding abortion, contraception and health care); Martha Davis, *Abortion Access in the Global Marketplace*, 88 N.C. L. Rev. 1657 (2010) (examining the expansion of public funding for abortions as part of a human rights movement in public health globally); Margaux J. Hall, *Using International Law to Promote Millennium Health Targets: A Role for the CEDAW Optional Protocols in Reducing Maternal Mortality*, 28 Wis. Int'l L.J. 74 (2010) (discussing the potential use of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women as a procedural mechanism for ensuring the right to safe abortions globally).

City's abortion laws. It further traces the changes to the Health Law that makes those influences clear. Part B discusses the impact of religion and class on the abortion debate in Mexico City, with a specific overview of how conscientiously objecting doctors injected freedom of religion issues into the debate over amendments to the health law. This section also delves into the ways in which discussions of class entered the dialogue and heavily shaped the outcome. Part C focuses on the constitutional challenge to the 2007 reforms and the outcome of that case before the Mexican Supreme Court. Part IV concludes by looking at the both the backlash and support these reforms have provoked in Mexico and throughout Latin America and how the reforms may provide a model for future liberalization of abortion laws across the region.

## II. ABORTION IN MEXICO AND BEYOND

Although Mexico City is the city with the second largest number of Catholics in the world,<sup>9</sup> the 2007 reforms to the abortion laws passed by an overwhelming majority in the Legislative Assembly.<sup>10</sup> It was a historic signal that Mexico City was finally confronting the grim and pervasive reality that in Latin America, and in Mexico in particular, women are seeking dangerous, clandestine abortions in record numbers despite—and because of—the total to near-total bans on abortion throughout the region. According to the United Nations, more than 500,000 Mexican women seek illegal abortions every year, with more than 2,000 dying from botched or unsafe procedures.<sup>11</sup> Mexico City is following an international movement that recognizes that the banning of abortion in poverty-stricken areas where access to sexual education and contraception is limited does little to stem the tide of unsafe and

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9 *Secretaría de Salud Mexicana Definió Normas Realización de Practicas Abortivas*, UPI LatAm, Apr. 26, 2007 (noting that 90% of the residents of Mexico City profess to be Catholic).

10 James C. McKinley, Jr., *Mexico City Legalizes Abortion Early in Term*, N.Y. Times (Apr. 25, 2007), <http://www.nytimes.com/2007/04/25/world/americas/25mexico.html>.

11 Malcolm Moore & Jerry McDermont, *Catholics to Appeal Mexico City's Abortion Law*, The Telegraph (London) (Apr. 27, 2007, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/1549761/Catholics-to-appeal-Mexico-Citys-abortion-law.html>.

deadly illegal abortions.<sup>12</sup> The United Nations addressed Mexico's need to deal with the serious problem of unsafe abortions in the periodic report on the country during the thirty-sixth session of the Committee on the Elimination of All Forms of Discrimination against Women ("CEDAW").<sup>13</sup> The recent changes in Mexico City's law, then, are nothing short of historic in the way that they incorporate this international recognition of a woman's right to a safe abortion and, more importantly, in that they provide a legal mechanism to ensure that women have *actual* access to safe abortions. These reforms are even more significant because of the social and political changes that had to occur for these gains to be realized.

### A. Language and Influences

A few notes are necessary at this point about the significance of language and cultural influences on the abortion debate. The reader should be familiar with the distinction between "liberalization" of abortion (which is to make the laws less restrictive) and the "decriminalizing" of abortion (which is to make the practice legal).<sup>14</sup> Latin America has a long and slow tradition of liberalization, which is distinct from a tradition of decriminalizing abortion, a much more familiar trend in the United States and Europe.<sup>15</sup> In addition, in much of the literature and official governmental and legal documents, abortion in Mexico is referred to as the "interruption of pregnancy."<sup>16</sup> In this way, "abortion," which is seen as illegal and immoral, is distinguished from the "interruption of pregnancy," which is legal and

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12 See Jack Chang, *Latin America's Abortion Bans Don't Deter Women; WHO Reports that Nations There Have the Highest Rate in the World*, The Houston Chronicle, Oct. 28, 2007, at A17.

13 Comm. on the Elimination of Discrimination Against Women, Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Mexico, U.N. Doc C/Mex/Co/6 (Aug. 25, 2006).

14 Mala Htun, *Sex and the State: Abortion, Divorce, and the Family Under Latin American Dictatorships and Democracies* 144 (Cambridge University Press 2003).

15 See The Ctr. for Reproductive Rights, *Roe v. Wade and the Right to Privacy* 51–58 (3d ed. 2003) (tracing the history of abortion liberalizing globally both before and after *Roe v. Wade*) [hereinafter *Roe v. Wade and the Right to Privacy*].

16 See generally Shalini Ananthanarayanan, *Access to Abortion for Victims of Rape in Mexico City: A Case Study of Policy Implementation* 67 (Mar. 2005) (unpublished B.A. thesis, Harvard University) (on file with Pusey Library, Harvard University) (providing a fascinating discussion on the significance of wording in the abortion laws of Mexico and other Latin American countries).

acceptable.<sup>17</sup> Until the 2007 reforms, the Mexican criminal code referred to the “mother” rather than the “woman” or “individual” in all abortion statutes, which “reveals assumptions the legislature made concerning the proper role of a pregnant woman.”<sup>18</sup> These differences of language are critical in Latin America, where the politics of “naming” has been an important component in the political and social acceptance of certain types of abortions.<sup>19</sup>

Furthermore, for the reader in the United States, it is important to recognize both the similarities and differences between the debate about abortion in Mexico and the United States. The democratic history and jurisprudence of the United States has couched our abortion debate in terms of a woman’s right to choice and privacy.<sup>20</sup> Mexico, on the other hand, has strongly based any liberalization of abortion laws on a woman’s right to health.<sup>21</sup> Though feminist movements in both the United States and Mexico have arguably been largely led by the educated elites, the abortion laws in Mexico have been explicitly focused on the protection of poor women who are most at risk of having unsafe abortions.<sup>22</sup> Whether this focus on the poor translates into a real effect on the lives of low-income women will be a topic of discussion later in this paper. It is important to note, though, how this focus in Mexico has driven the legal rationale for liberalized abortion laws towards the right to health and less towards a general right to privacy or choice, which is a “right”

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17 *Id.* at 67–73.

18 Alejandro Madrazo, *The Evolution of Mexico City’s Abortion Laws: From Public Morality to Women’s Autonomy*, 106 *Int’l J. Gynecology & Obstetrics* 266, 267 (2009).

19 Ananthanarayanan, *supra* note 16, at 67–73.

20 *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding that the right of personal privacy includes “the abortion decision”).

21 Htun, *supra* note 14, at 43.

22 *See Acuerdo que Reforma, Adiciona y Deroga Diversos Puntos de la Circular/GDF-SSDF/01/06 que Contiene los Lineamientos Generales de Organización y Operación de los Servicios de Salud Relacionados con la Interrupción del Embarazo en el Distrito Federal (Agreement to Reform, Add to and Repeal Parts of the Circular/GDF-SSDF/01/06 which Contains the General Guidelines of Organization and Operation of the Health Services Related to Interruption of Pregnancy in the Federal District)*, GODF, 4 de Mayo de 2007 (Mex.), at 2 [hereinafter GODF May 4, 2007] (noting that the reforms were meant to decrease maternal mortality and social inequality for all women, but especially those from the “least protected classes of society”).

bestowed on the elites much more than on the poor.<sup>23</sup> Although many abortion activists on both sides of the issue, such as the leading Mexican anti-abortion group *Provida* (“Pro-Life”), and the abortion activist group the *Caravana de las Mujeres por el Derecho a Decidir* (“Caravan of Women for the Right to Choose”), have begun to adopt the language of “choice” and “life,”<sup>24</sup> the historic focus has been on health.<sup>25</sup>

Finally, it is critical to note that the anti-abortion movement in Mexico has been spearheaded by the Catholic Church.<sup>26</sup> Though the United States’ Pro-Life Movement also has very close ties to the religious right, it is useful to emphasize the historical and immense power of the Catholic Church in Latin America and differentiate its role there versus in the United States. Although the Catholic Church in Mexico, as in the United States, has been struck with a series of sex-abuse scandals involving priests, the Church remains enormously influential in Mexico and any discussion of abortion must also discuss the reactions and policies of the Church.<sup>27</sup> It is also the Church’s influence that has guided the debate more towards a health rationale

23 Indeed, as Martha Davis notes in her article, *Abortion Access in the Global Marketplace*, the focus on privacy over health in the United States actually diverts the United States from dealing with significant issues of access, which most affect women in poverty. As she notes, because of federal and state restrictions on public funding:

[E]ighty-seven percent of abortions in the United States are privately funded, either paid for by individuals or through insurance. In the United States, this private “market” for abortion services coexists uneasily with the notion, repeatedly affirmed by the U.S. Supreme Court, that abortion is a fundamental constitutional right, at least in the early stages of pregnancy. At first blush, this seems contradictory. Under U.S. law, violation of an established constitutional right generally gives the affected party a claim against the government. But if the government is under no obligation to pay for the procedure, what is left of the right has little practical significance for many women.

88 N.C. L. Rev. 1657, 1665–66 (2010) (citation omitted).

24 See *Festejan su derecho a decidir*, Reforma (Mex.), Sep. 24, 2007, § Cuidad y Metrópoli at 14.

25 Htun, *supra* note 14, at 43.

26 See *id.* at 12–13, 22–25.

27 *Breaking a Taboo*, The Economist (Apr. 26, 2007), <http://www.economist.com/node/9079852>; see also McKinley, Jr., *supra* note 10 (discussing both the historical importance of the Catholic Church in Mexico and also its eroding status in the wake of sex abuse scandals).

than a choice rationale.<sup>28</sup> Indeed, the political and social underpinnings of a country have an enormous impact on how that country frames and justifies abortion. In Cuba, for instance, the strong socialist influences have paved the way for full access to abortion in the first trimester on pragmatic grounds, having nothing to do with a woman's right to choose or her right to health.<sup>29</sup> It is critical, therefore, to understand the major socio-political influences in a country when attempting to understand the logic of abortion liberalization.

## B. The Historical Picture in Latin America and Mexico

Latin America has some of the most restrictive abortion laws in the world.<sup>30</sup> Paradoxically, it also has the highest rate of abortion in the world.<sup>31</sup> Thirty-one out of every 1,000 women in Latin America will have an abortion at some point in her life.<sup>32</sup> Approximately 5,000 women die each year in Latin America as a result of unsafe, clandestine abortions. Although 800,000 women are treated for abortions at hospitals,<sup>33</sup> Latin America has been slow to change. Only Cuba and Puerto Rico allow legal abortions on demand.<sup>34</sup> Uruguay will shortly sign a bill into law that allows first trimester abortions for any reason.<sup>35</sup> All other countries either ban it in all circumstances or allow it in limited circumstances (for example, to save a woman's life, to preserve a woman's physical or mental health, or in cases of rape).<sup>36</sup> Every Mexican state provides some limited exceptions from

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28 See Htun, *supra* note 14, at 23, 144–45.

29 *Id.* at 45 (noting that “in most of these [socialist] countries . . . the state permitted abortion to keep families small and women in the labor force, not because it recognized a women's right to choose”).

30 Chang, *supra* note 12.

31 *Id.*

32 *Id.*

33 A *Question of Life and Death: Abortion*, *The Economist* (May 17, 2007), <http://www.economist.com/node/9205883>.

34 The Ctr. for Reproductive Rights, *The World's Abortion Laws: Fact Sheet* (May 2007), available at [http://reproductiverights.org/sites/crr.civactions.net/files/documents/Abortion%20Map\\_FA.pdf](http://reproductiverights.org/sites/crr.civactions.net/files/documents/Abortion%20Map_FA.pdf) [hereinafter *The World's Abortion Laws: Fact Sheet*].

35 Simon Romero, *Uruguay Senate Approves First Trimester Abortions*, *N.Y. Times*, Oct. 17, 2012, at A6, available at [http://www.nytimes.com/2012/10/18/world/americas/uruguay-senate-approves-first-trimester-abortions.html?\\_r=0](http://www.nytimes.com/2012/10/18/world/americas/uruguay-senate-approves-first-trimester-abortions.html?_r=0).

36 *The World's Abortion Laws: Fact Sheet*, *supra* note 34; *Nicaragua: firman ley contra aborto*, *BBCMundo.com* (Nov. 18, 2006, 5:24 PM), [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_6161000/6161824.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_6161000/6161824.stm).

the general ban on abortion, most commonly in cases of rape or where the procedure is necessary to save the woman's life.<sup>37</sup> Mala Htun notes in her work, *Sex and the State: Abortion, Divorce, and the Family Under Latin American Dictatorships and Democracies*:

In the civil law countries of Latin America, laws on abortion, divorce, and family relations are embedded in civil and criminal codes. They are not short-term policies introduced and withdrawn by each incoming government but weighty tomes passed from one generation to the next. . . . The civil and criminal laws of Latin America thus have a strong ethical component, making ideas an important part of debates about legal change.<sup>38</sup>

One of the most common exceptions to the immensely restrictive abortion laws of Latin America allows for an abortion in the case of rape. These so-called "compassionate abortions" were first legalized in Argentina in 1922.<sup>39</sup> Other states quickly followed, including Brazil and Mexico, which legalized "compassionate abortions" in the 1930s.<sup>40</sup> Initially, the Catholic Church failed to energetically resist these early reforms.<sup>41</sup> General sentiment in Latin America was so strongly opposed to abortion that clerical concerns about the advancing cause of abortion were unnecessary and thus limited.<sup>42</sup> And although abortions have been allowed in the case of rape in Mexico since the Criminal Code was codified in 1931, a woman's access to an abortion in those cases was limited at best.<sup>43</sup> Indeed, a study of clinical files from the period between 1991 and 2001 at the Hospital Gea González, the only public hospital to perform abortions at the time, showed that out of 197 women who had become pregnant as the result of rape and for which information

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37 Grupo de Información en Reproducción Elegida ("GIRE") (Information Group on Reproductive Choice), *Los Derechos Reproductivos en la Legislación y en las Políticas Públicas de México* (Reproductive Rights in Mexican Legislation and Public Policy) 4 (Nov. 2010), available at [http://www.gire.org.mx/publica2/derechoslegislacionpp\\_2010.pdf](http://www.gire.org.mx/publica2/derechoslegislacionpp_2010.pdf).

38 Htun, *supra* note 14, at 2–3.

39 *Id.* at 16, 143, 145.

40 *Id.* at 143.

41 *Id.* at 145, 149.

42 *Id.*

43 See Ananthanarayanan, *supra* note 16, at 44 (compiling the few studies available to show that abortions pre-Robles Law were rarely performed).

about the outcome of the patient's pregnancy was available, only forty-four received authorized abortions.<sup>44</sup>

## C. State of the Law in Mexico

### 1. The Law Pre-2000

Much of Mexico's legal system mirrors that of the United States. Mexico is made up of thirty-one states and the Distrito Federal (Federal District), also known as Mexico City.<sup>45</sup> The national constitution, which was written in 1917 after the Mexican Revolution, guides the states, but each state is responsible for promulgating their own laws.<sup>46</sup> Although Mexico's legal system is within the civil law tradition, there are some strong common law influences, including *stare decisis*.<sup>47</sup> The federal judiciary consists of sixty-eight district courts (including the courts of the Federal District), twenty-one circuit courts and an appointed Supreme Court.<sup>48</sup> Though Article 17 of the Mexican constitution provides that justice must be both prompt and impartial, the legal system has been plagued in recent history with a reputation for corruption, inefficiency, and endless delays.<sup>49</sup>

The country's political history has, in recent memory, been in a state of flux that has had a profound impact on the legal system. During most of Mexico's modern history, the country was controlled by the Partido Revolucionario Institucional ("Revolutionary Institutional Party" or "PRI").<sup>50</sup> However, since 1968, PRI's power slowly declined in the country and especially in Mexico City.<sup>51</sup> In 1997, PRI lost the Mexico City mayoral election to the Partido de la Revolución Democrática ("Democratic Revolutionary Party" or "PRD"), resulting in a seismic shift in power in Mexican politics.<sup>52</sup> In

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44 *Id.*

45 Thomas H. Reynolds & Arturo A. Flores, *Mexico*, Foreign Law Guide, <http://www.foreignlawguide.com/ip/flg/Mexico%20Introduction.htm> (last visited Oct. 22, 2012).

46 *Id.*

47 *Id.*

48 *Id.*

49 See Robert Kossick, *The Rule of Law and Development in Mexico*, 21 *Ariz. J. Int'l & Comp. L.* 715 (2004) (discussing Mexico's historic failure to maintain the rule of law in its justice system from the 1980s to the late 1990s).

50 Ananthanarayanan, *supra* note 16, at 26.

51 *Id.*

52 *Id.*

2000, the greatest change came when the PRI lost the presidency to Vicente Fox<sup>53</sup> of the Partido Acción Nacional (“National Action Party” or “PAN”).<sup>54</sup> The change also transformed the Mexican legal system by revitalizing the Suprema Corte de Justicia (“National Supreme Court of Justice” or “SCJN”),<sup>55</sup> which had once ruled almost exclusively in favor of the executive.<sup>56</sup> With this change has also come a move to a “functional version of the tri-partite division of powers,”<sup>57</sup> as well as a renewed openness to federalism and state power.<sup>58</sup>

Within this context of transformation, there was a revitalized hope for change among the population. Before the 2000 mayoral election in Mexico City, a coalition of non-governmental organizations (“NGOs”) mobilized to create the 1998–1999 Mexico City Campaign for Access to Justice for Women, which included suggestions for the liberalization of abortion laws in Mexico City.<sup>59</sup> Most Mexican states still model their abortion laws on those appearing in the original 1931 Criminal Code.<sup>60</sup> Movements to liberalize abortion laws began in the 1970s, led by groups like Mujeres en Acción Solidaria (“Women in Solidarity Action”) or the Movimiento Nacional de Mujeres (“National Women’s Movement”).<sup>61</sup> In 1976, the Coalición de Mujeres Feministas (“Coalition of Feminist Women”) brought the first (unsuccessful) proposal to legalize abortion before Congress.<sup>62</sup> In 1992, the Grupo de Información en Reproducción Elegida (“Information Group on Reproductive Choice” or “GIRE”) was founded.<sup>63</sup> GIRE would soon

53 It should be noted that on July 1, 2012, Enrique Peña Nieto, a member of the PRI party, was elected president of Mexico amid allegations of fraud.

54 *Opposition Wins Mexican Elections*, ABC News (July 3, 2000), <http://abcnews.go.com/International/story?id=83273&page=1>.

55 Kossick, *supra* note 49, at 727.

56 *Id.* at 750.

57 *Id.* at 753.

58 Telephone Interview with Professor Jorge Domínguez, Antonio Madero Professor of Mexican and Latin American Politics and Economics, Harvard University (Oct. 17, 2007).

59 Ananthanarayanan, *supra* note 16, at 24.

60 *See id.*

61 Olga Bustos, *La Despenalización No Promueve el Aborto*, La Jornada en la Ciencia, <http://ciencias.jornada.com.mx/foros/despenalizacion-del-aborto/opinion/segunda-sesion/la-despenalizacion-no-promueve-el-aborto> (last visited Feb. 24, 2009).

62 *Id.*

63 *Who are we?*, GIRE, [http://www.gire.org.mx/index.php?option=com\\_content&view=article&id=392&Itemid=1115&lang=en](http://www.gire.org.mx/index.php?option=com_content&view=article&id=392&Itemid=1115&lang=en) (last visited Aug. 16, 2011).

emerge as the strongest advocate for reproductive choice in Mexico and it still leads the movement today.<sup>64</sup>

The struggle for these groups has not always been easy. For instance, the 1998–1999 campaigners had particular hope that they would succeed in liberalizing abortion laws after the PRD candidate for mayor, Cuauhtémoc Cárdenas, gave them specific assurances that he would push for liberalization upon entering office.<sup>65</sup> Once in office though, Cárdenas came to realize what so many other Mexican politicians had discovered before him—supporting abortion in a Catholic country can be a costly political move supported by few and promoted by fewer.<sup>66</sup>

## 2. Changes in 2000: The Robles Law

In 2000, the issue of *access* to legal abortions finally came to the forefront of the debate about abortion in Mexico after the press publicized the story of a thirteen-year-old rape victim in the state of Baja California who had been denied access to a legal abortion by the state Attorney General and the local public hospital.<sup>67</sup> Included among the accusations against the State were allegations that the Attorney General, Salazar Pimental, strongly tried to dissuade the girl, known only as “Paulina,” from having an abortion by bringing her to see a Catholic priest.<sup>68</sup> In April 2000, Paulina’s son was born and her case was taken up by a number of Mexican feminist groups who brought a suit against Mexico in the Inter-American Court on Human Rights and generated an extraordinary amount of press coverage.<sup>69</sup> What became clear from the *Paulina* case, as it was dubbed in Mexico, was the significant gap between the *de jure* access to abortion in cases of rape, which was on the books, and the *de facto* access to abortion in women’s lives.<sup>70</sup> What was even more apparent after *Paulina* is that most Mexicans, who showed general outrage at the young girl’s treatment, were not nearly as opposed to abortion as

64 Bustos, *supra* note 61.

65 Ananthanarayanan, *supra* note 16, at 25.

66 *Id.*

67 GIRE, *supra* note 7, at 5.

68 *Id.* at 17.

69 *Paulina del Carmen Ramírez Jacinto v. Mexico*, Case 161-02, Inter-Am. Comm’n H.R., Report No. 21/07, OEA/Ser.L/V/II.130, doc. 22, rev. 1 (2007), available at <http://www1.umn.edu/humanrts/cases/21-07.html>; GIRE, *supra* note 7, at 69.

70 Ananthanarayanan, *supra* note 16, at 44.

had long been suspected.<sup>71</sup> In her work, *Access to Abortion for Victims of Rape in Mexico City: A Case Study of Policy Implementation*, Shalini Ananthanarayanan compiled a number of surveys taken about national and local public opinion on abortion in Mexico from the late 1990s until 2000. She found that in 2000, 69% of Mexicans on the national level agreed that abortion should be permitted in certain circumstances. A full 80% of Mexico City youth surveyed agreed that abortions should be provided in the case of rape.<sup>72</sup>

Those in power in Mexico City were not blind to the public outrage over the *Paulina* case. While abortions in cases of rape had long been legal, a study in 2001 found that judicial decisions (or lack thereof) had made it virtually impossible for victims of rape to actually access them.<sup>73</sup> The PDR, having lost the presidential election, was in a unique position to distinguish itself in this area without taking a major political risk.

It was in this environment that significant changes—especially in the area of access—were made to Mexico City's abortion laws. On August 18, 2000, a series of reforms was passed, entitled the Robles Law after Rosario Robles, the first female mayor of Mexico City.<sup>74</sup> These reforms would profoundly change the legal landscape of abortion law in Mexico City.<sup>75</sup> The Robles law consisted of two prongs. The first reformed Article 334 of the Criminal Code to extend the exceptions for legal abortion to three additional circumstances: where the mother's life was at risk, where there was artificial insemination without consent, and where the fetus suffered from a life-threatening genetic defect.<sup>76</sup> The second part

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71 *Id.* at 32.

72 *Id.*

73 Margarita Martinez, *Women's Rights Ignored by Latin American Courts*, Women's eNews (Nov. 30, 2001), <http://www.womensenews.org/article.cfm?aid=738>.

74 Julia Preston, *Mexico City Journal; Tough, Cheerful Mayor Wins Hearts*, N.Y. Times, Feb. 28, 2000, at A4, available at <http://www.nytimes.com/2000/02/28/world/mexico-city-journal-tough-cheerful-mayor-wins-hearts.html?pagewanted=all&src=pm>.

75 The Robles Law can be found in Decreto por el que se Reforman y Adicionan Diversas Disposiciones del Código Penal para el Distrito Federal y del Código de Procedimientos Penales para el Distrito Federal (Decree to Reform and Add to Various Dispositions of the Penal Code for the Federal District and the Code of Criminal Procedures for the Federal District), GODF, 24 de Agosto de 2000 (Mex.), at 2 [hereinafter GODF Aug. 24, 2000]. See also Ananthanarayanan, *supra* note 16, at 137 (translating the Robles Law).

76 Ananthanarayanan, *supra* note 16, at 14.

of the Robles Law directly addressed the issue of access for the first time in Mexican legal history by laying out a procedure for the authorization and administration of abortion in cases of rape.<sup>77</sup>

Under the Robles Law, Article 131 of the Code of Criminal Procedures provided that if a victim of rape requested an abortion, she could present evidence of the rape to the Public Ministry and then apply for authorization for an abortion at a public hospital.<sup>78</sup> It further provided that hospitals were obligated to perform abortions and that in all cases where a woman sought an abortion, she would be provided with “impartial, objective, true and sufficient information about procedures, risk, consequences and effects.”<sup>79</sup> Possibly to appease the conservative faction in the country, the law also required that the public health institution “offer the necessary orientation and support [after the abortion] to facilitate [the woman’s] personal . . . rehabilitation in order to avoid subsequent abortions.”<sup>80</sup>

In April 2002, The Ministry of Health of Mexico City also published guidelines to accompany the law, entitled *General Guidelines for the Organization and Operation of Health Services Related to the Interruption of Pregnancy in the Federal District*.<sup>81</sup> These guidelines helped strike a balance between the rights of the rape victim and the rights of the conscientiously objecting doctor by providing that in instances where a doctor chose not to perform an abortion, he was required to find a doctor who did not object to performing the procedure.<sup>82</sup> Where the procedure was urgent,

77 *Id.*

78 *Id.* at 42–43.

79 *Id.* at 14–15; GODF Aug. 24, 2000, *supra* note 75, at 2.

80 GODF Aug. 24, 2000, *supra* note 75, at 2.

81 Secretaría de Salud del Distrito Federal [Ministry of Health of Mexico City], *Lineamientos Generales de Organización y Operación de los Servicios de Salud Relacionados con la Interrupción del Embarazo en el Distrito Federal (General Guidelines for the Organization and Operation of Health Services Related to the Interruption of Pregnancy in the Federal District)*, Circular/GDF-SSDF/02/02, GODF, 23 de Abril de 2002 (Mex.), at 22–25 [hereinafter GODF Apr. 23, 2002].

82 *See* GIRE, *supra* note 7, at 46 (quoting the Mexico City Health Law December 2003, Paragraph 7, Article 16):

In the cases permitted by the new Penal Code of Mexico City, health care providers whose religious beliefs or personal convictions conflict with their obligation to perform legal abortions and, thus render them conscientious objectors, must refer the woman to a doctor who does not object to performing an abortion. When the termination of a pregnancy is of such urgency as to safeguard the woman’s health or life, health care providers cannot invoke their right to conscientious objection. Public health institutions shall be obligated to guarantee

however, even a conscientious objector was obliged to perform the abortion.<sup>83</sup> This essentially required that each public hospital have some non-objecting doctors on staff. Though there were still barriers to implementation after the Robles Law was passed, the fact that access had become such a considerable part of the reforms would pave the way for even greater change in the future.

### 3. 2007 Reforms<sup>84</sup>

In April 2007, the ALDF radicalized abortion laws in a way never before experienced in Latin America. In a vote of forty-nine to nineteen (with one abstention), the Assembly passed a comprehensive set of reforms that legalized abortion through the twelfth week of pregnancy for any reason and greatly expanded women's access to abortion, not just in cases of rape but at any point during the first twelve weeks of her pregnancy.<sup>85</sup>

The Legislative Assembly reformed Articles 144, 145, 146 and 147 of the Código Penal del Distrito Federal ("Criminal Code for the Federal District"). Significantly, the Assembly changed Article 144 (originally Article 329) from its prior reading of "abortion is the death

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the timely provision of abortion services and permanent availability of staff that are not conscientious objectors on the issue.

83 *Id.*; see also GODF Apr. 23, 2002, *supra* note 81, at 22–25 (laying out guidelines for doctors and public hospitals in the Federal District relating to abortion practices).

84 A note on sources is necessary at this point. For this section, I have strongly relied on the following item from ALDF legislative history: Comisiones Unidas de Administración y Procuración de Justicia, de Salud y Asistencia Social, y de Equidad y Género (Joint Commissions on Administration and Law Enforcement, Health and Welfare, and Equality and Gender), Asamblea Legislativa del Distrito Federal (Legislative Assembly of the Federal District), Dictamen: Iniciativa de Reforma de los Artículos 145, 146 y Deroga el 147 y 148 del Código Penal para el Distrito Federal; Reforma el Artículo 14 Fracción II, y se Anexa la Fracción X del Artículo 2 y los Artículos 14 Bis 1, 14 Bis 2, 14 Bis 3, 14 Bis 4, 14 Bis 5, 14 Bis 6 y se Derogan los Artículos 16 Bis 6 y 16 Bis 7 de la Ley de Salud del Distrito Federal (Report: Initiative to Reform Articles 145, 146 and Repeal 147 and 148 of the Penal Code for the Federal District; to Reform Article 14 Fraction II and the Addition of Fraction X of Article 2 and Articles 14 Bis 1, 14 Bis 2, 14 Bis 3, 14 Bis 4, 14 Bis 5, 14 Bis 6 and the Repeal of Articles 16 Bis 6 and 16 Bis 7 of the Health Law of the Federal District), 19 de Abril de 2007 (Mex.) (presenting the Resolution that was written by Diputado (Congressman) Armando Tonatiuh González Case and accepted by the ALDF during their April 24, 2007 vote and explaining the proposed changes to the Criminal Code and the Health Law) [hereinafter Dictamen].

85 GODF Apr. 26, 2007, *supra* note 4, at. 2–3; GODF May 4, 2007, *supra* note 22.

of the product of conception at any moment of pregnancy”<sup>86</sup> to read, “abortion is the interruption of pregnancy after the twelfth week of gestation.”<sup>87</sup> Article 147 previously laid out the punishment for abortion by requiring that “one to three years in prison will be imposed on a woman who voluntarily practices an abortion or consents to have another do the abortion.”<sup>88</sup> In the reformed Code, Article 145 became the law for punishment and now states: “Three to six months in prison or 100 to 300 days of community service will be imposed upon a woman who voluntarily practices an abortion or allows another to cause her to have an abortion, after twelve weeks of pregnancy.”<sup>89</sup> Article 148, which stated exceptions to criminal responsibility for the crime of abortion, remained the same as before.<sup>90</sup>

In addition to these changes in the Criminal Code, there were also profound changes to the Ley de Salud del Distrito Federal (“Health Law of the Federal District”). Specifically, the addition of Paragraph X to Article 2 of the Health Law set up the Comisión Clínica de Valoración (“Clinical Commission of Evaluation”) to “register the number of people seeking an interruption of pregnancy.”<sup>91</sup> Further, there were a number of additions to Article 14 of the Health Law in Bis 1 through Bis 6.<sup>92</sup> These changes dramatically expanded the scope of services provided to women seeking legal abortions. Article 14 Bis 1 established the right of the woman to seek an abortion within the first twelve weeks of pregnancy and the articles following provided protections for that right.<sup>93</sup> For instance, Article 14 Bis 3 acts to guarantee that doctors perform abortions on demand by requiring hospitals to report all requests for abortions to the Clinical Commission of Evaluation. Article 14 Bis 5

86 GODF July 16, 2002, *supra* note 5, at 29.

87 GODF Apr. 26, 2007, *supra* note 4, at 2.

88 GODF July 16, 2002, *supra* note 5, at 29.

89 GODF Apr. 26, 2007, *supra* note 4, at 2.

90 Jorge A. Goddard, *La reforma del Código Penal del Distrito Federal que autoriza el aborto del menor de doce semanas* (The Reform to the Penal Code for the Federal District that Allows Abortion Within Twelve Weeks), *Boletín mexicano del derecho comparado* (Mexican Journal of Comparative Law), Año IV, núm. 7–8, Jan.–Dec., 28 (2007).

91 Dictamen, *supra* note 84, at 34.

92 In Spanish, these additions are noted as “Artículos 14 Bis 1, 14 Bis 2, 14 Bis 3, 14 Bis 4, 14 Bis 5 y 14 Bis 6. The term “bis” is used in Mexican law as an addition, not a subsection. Because it is difficult to capture the meaning of “Bis” in English, I will use the Spanish term in this Article.

93 Dictamen, *supra* note 84, at 35.

requires that all public hospitals provide abortions free of charge to women seeking them.<sup>94</sup> Bis 6 of the same article recognizes that Mexico is a society with a “plurality of beliefs,” but insists that doctors who are conscientious objectors must contact a non-objecting doctor to perform a requested abortion.<sup>95</sup>

In addition, as part of the “secondary law”<sup>96</sup> of the health code, the government published a guide for health care professionals to follow in performing legal abortions.<sup>97</sup> Among other requirements, a doctor must ensure that the woman seeking the abortion is indeed within the twelve-week period and he must obtain her informed consent, which also requires giving the woman fair and accurate information about her options.<sup>98</sup>

The ALDF also established “un criterio de razonabilidad” (“criteria of reasonableness”) for deciding on the twelve-week mark for legal abortions. This reasonableness standard was based on a desire to avoid an “arbitrary result” and create a fair balance between the rights of both the fetus and the mother.<sup>99</sup> The Resolution laid out seven reasons for selecting twelve weeks as the mark between legal and illegal abortions: 1) maternal mortality is lowest for abortions performed before the first trimester; 2) the medical procedure for abortions performed under twelve weeks is the best established in Mexico City and is in line with international standards laid out by the World Health Organization; 3) during the first trimester the fetus’s nervous system has not yet fully developed and cannot perceive certain complex sensations—namely, pain; 4) up until twelve weeks, the embryo weighs only twenty grams and measures eight centimeters; 5) the fetus is not viable during the first twelve weeks of pregnancy; 6) of every 100 pregnancies, between thirteen and fifteen end in miscarriages, nine out of ten of which occur within the first twelve weeks of pregnancy; and finally 7) gestational differences appear between the twelfth and thirteenth week, when the embryo becomes a fetus.<sup>100</sup> In defining this standard, the ALDF took its cue from the World Health Organization and the International

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94 *Id.* at 36.

95 *Id.* at 37.

96 The “secondary law” in Mexico consists of agreements within specific ministries—for instance, the Ministry of Health—on how the laws will be carried out. These agreements then become law.

97 GODF May 4, 2007, *supra* note 22, at 2–3.

98 *Id.* at 3.

99 Dictamen, *supra* note 85, at 27.

100 *Id.* at 28–29.

Federation of Gynecology and Obstetrics among others—just one way in which the ALDF would rely on the international community for guidance in the abortion debate.<sup>101</sup>

#### D. International Action on Abortion

Much of the debate and change in Mexico surrounding abortion law reflects a greater global movement toward reform of abortion laws.<sup>102</sup> Mexico City's reforms also illuminate an emerging human rights trend towards recognizing a "right to health" that includes the right to a safe abortion.<sup>103</sup> The right to health is based on a set of layered principles. First, and most simply, it is premised on the assumption that nations have an obligation to provide meaningful public health services to their populations.<sup>104</sup> But the right to health also goes to deeper issues of reproductive liberty, namely a woman's right to "define the scope of health care that [she] needs."<sup>105</sup> Most Latin American countries ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") in the 1980s and 1990s.<sup>106</sup> It became law in these countries, at least in theory.<sup>107</sup> It has helped to guide and shape reproductive health policy in Mexico. Furthermore, the Committee on the Elimination of All Forms of Discrimination Against Women regularly publishes reports on specific countries, including Mexico, noting where improvement is still needed on issues of gender equality.<sup>108</sup>

In addition, the United Nations conferences in Cairo (1994) and Beijing (1995) both addressed unsafe abortions.<sup>109</sup> The Cairo program recognized unsafe abortion as a major health issue, while

101 *Id.* at 30.

102 *See* *Roe v. Wade and the Right to Privacy*, *supra* note 15, at 51 (discussing the role of *Roe v. Wade* in "bolster[ing] an emerging global trend toward recognizing women's right to reproductive autonomy").

103 *See generally* Hammell, *supra* note 8 (tracing a growing acceptance among foreign countries and international bodies that the "right to health" is a human rights issue and includes the right to a safe abortion).

104 *Id.* at 133.

105 *Id.* at 147.

106 Htun, *supra* note 14, at 16.

107 *Id.*

108 Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), *Sixth Periodic Report on Mexico*, at 9, U.N. DocC/SR.752(B) (Sep. 13, 2006) [hereinafter *Report on Mexico*].

109 *Roe v. Wade and the Right to Privacy*, *supra* note 15, at 52.

the Beijing Platform for Action went further by proposing both that abortion be decriminalized and that countries take steps to address the causes and consequences of illegal abortion.<sup>110</sup> All of these proposals were reinforced at the five-year review of the Beijing Platform.<sup>111</sup> The review, however, noted that “while some measures have been taken in some countries, the actions set out in . . . the Platform for Action regarding the health impact of unsafe abortion and the need to reduce the recourse to abortion have not been fully implemented”—voicing yet another call by the United Nations to reduce unsafe abortions globally.<sup>112</sup>

In addition, a 2006 report by the United Nations’ Economic and Social Council, entitled *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, called for the extensive use of indicators to determine the robustness of the right to health in a particular country.<sup>113</sup> Almost every indicator on the list addressed the individual’s access to reproductive health.<sup>114</sup> Among the questions that the report laid out, and demanded that countries ask of themselves, are the following: “Does the State have a national sexual and reproductive health strategy or plan of action?,” “Does the strategy/plan of action establish a procedure for the State to regularly disseminate information on sexual and reproductive health policies?,” “Does State law criminalize abortion?,” and “Does the State have a strategy and plan of action to prevent unsafe abortions or to provide post-abortion care?”<sup>115</sup> The report also stressed that eliminating unsafe abortion should become a part of any meaningful health program.<sup>116</sup>

Additionally, changes in the United States and in other countries have had an international impact.<sup>117</sup> According to a 2003

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110 *Id.* at 52–53.

111 *Id.* at 53.

112 G.A. Res. S. 23/3, U.N. GAOR, 23rd Special Sess., U.N. Doc. A/Res/s-23, at 6 (Nov. 16, 2000).

113 Comm’n. on Human Rights, *Economic, Social and Cultural Rights: Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Paul Hunt, at 23–34, U.N. Doc E/CN.4/2006/48 (Mar. 3, 2006) (listing indicators in 18 major areas of government) [hereinafter *Report of the Special Rapporteur*].

114 *Id.* at 23–34.

115 *Id.*

116 *Id.* at 31–32.

117 *Roe v. Wade and Right to Privacy*, *supra* note 15, at 51.

report by the Center for Reproductive Rights, which reviews abortion policy around the globe, the years following the *Roe v. Wade* decision have seen “an emerging global trend toward recognizing women’s right to reproductive autonomy.”<sup>118</sup> For instance, Sweden, Denmark and France are among some of the countries that also reformed their abortion policies during the *Roe*-era. This trend toward global recognition has continued, with countries like Turkey, Romania and South Africa more recently expanding the scope of their abortion laws.<sup>119</sup> In addition, in 2007, Amnesty International, a historically Catholic organization, which has avoided the abortion debate, adopted a resolution that supports abortion in the case of rape, incest, violence, or where the woman’s health or life was in danger, as part of a comprehensive plan to keep women free from violence and sexual coercion.<sup>120</sup>

Interestingly, a number of countries have been dealing specifically with issues of access to safe and legal abortions.<sup>121</sup> The case of Nepal is instructive. Challenges before the Supreme Court of Nepal in 2002 and 2009 have forced the government to expand the scope of access to abortion in the country.<sup>122</sup> A suit brought against Nepal in 2007, the same year as the Mexico City reforms, alleged that Nepal failed to “implement the abortion law . . . and actually make abortion accessible” in violation of human rights obligations under CEDAW.<sup>123</sup> The Supreme Court imposed on the government the duty to greatly expand access to abortions by providing financial coverage for the procedure and decentralizing abortion services in the country.<sup>124</sup> A 2006 ruling by the Constitutional Court of Colombia also put access to legal abortion and the right to health front and center by ruling that hospitals could not turn away women seeking legal

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118 *Id.*

119 *Id.* at 56–59.

120 Theresa Braine, *Amnesty Abortion Stance Bolsters Mexico Activists*, Women’s eNews (Aug. 17, 2007), <http://www.womensenews.org/article.cfm/dyn/aid/3280/context/archive> (describing abortion rights supporters’ reaction to Amnesty’s resolution); *The Church and Abortion*, 28 *Conscience* 7 (2007).

121 *See generally* Hammell, *supra* note 8 (examining a series of cases that came before local and international courts regarding a woman’s right to abortion in Portugal, Nepal, Colombia, Mexico, Spain and Peru); Hammell argues that the “the right to health has been effective both in persuading states to liberalize abortion laws and in causing states to make abortion accessible once it is legal.” *Id.*

122 *Id.* at 150–51.

123 *Id.*

124 *Id.*

abortions under the guise of conscientious objection, but rather must provide women with an immediate and adequate referral.<sup>125</sup> Peru and Poland have also been brought to task by the Human Rights Committee and the European Court of Human Rights, respectively, for their lack of commitment to the principles of the right to health and reproductive liberty.<sup>126</sup> It appears that access to safe and legal abortions is increasingly becoming a symbol of a country's commitment to the right to health and reproductive liberty for its citizens.

### III. ACCESS AND ABORTION

Within the first month of the enactment of the 2007 reforms in Mexico City, public hospitals received 700 requests for information about abortion and 300 requests for abortion procedures.<sup>127</sup> In a country where abortion has so long been shrouded in degradation and shame, it was significant that in such short order so many sought out the opportunity to end their pregnancies in a public hospital. Mexico City's former Secretary of Health, Manuel Mondragón y Kalb, was vigilant in monitoring that hospitals conform to the law.<sup>128</sup> In the weeks after the law was passed, Mondragón noted that Mexico City did not become a "paradise of abortion," as many conservative politicians and clergy members predicted it would if it became the only Mexican state with legal abortions.<sup>129</sup> Instead, Mexico City became a haven for women who choose to end their pregnancies in a safe and legal way.

Full treatment of this transformation requires looking to a number of areas, including the legal and socio-political influences that predominate the abortion debate. By tracing the international

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125 *Id.* at 151–52.

126 *See id.* at 147 (discussing the case of *K.L. v. Peru* before the Human Rights Committee and the case of *Tysiac v. Poland* before the European Court of Human Rights) Both cases addressed allegations that women had been denied abortions where they should have been available under the law. *Id.*

127 Manuel Durán, *Acumulan hospitales peticiones de aborto: Afirma Mondragón que han interrumpido 'decenas' de embarazos; hay 300 solicitudes más*, Reforma (Mex.), May 16, 2007, § Cuidad y Metrópoli, at 7.

128 *Id.*

129 Mirtha Hernández, *Suma ya la Ssa 215 abortos: Diario se practican en promedio, 7 interrupciones de embarazo. Entrega secretario informe actualizado, destaca que ninguna mujer ha muerto*, Reforma (Mex.), May 25, 2007, § Cuidad y Metrópoli, at 2.

legal influences, the religious challenges and the class debates surrounding abortion, as well as the subsequent support of the law by the Supreme Court, this paper attempts to create a framework with which to view not only the law in Mexico City, but perhaps future reforms across both Mexico and Latin America.

### A. International Influence and Legal Reform on Abortion

A paradigm shift from the fetus's "right to the life" towards a woman's "right to health" lies at the base of this movement. Although neither right has been abandoned for the other, in passing the 2007 reforms the ALDF engaged in a serious debate about balancing these rights, taking care to assure that a woman's right to health remained a central tenant of the Resolution.<sup>130</sup> Much as the jurisprudence in the United States has tried to strike a balance between these two competing interests,<sup>131</sup> so too did the ALDF struggle to find a defining line that protected both the fetus and the woman's health.<sup>132</sup> Ultimately, the legislature adopted the reasonableness standard explained above.<sup>133</sup>

Mexico, though, has looked to the international community for much more than just the defining terms of the abortion debate. International organizations and treaties—like the CEDAW—have been critical guideposts in Mexico's attempts at reform.<sup>134</sup> CEDAW, in fact, has made its own specific attempts to influence Mexico; a 2006 CEDAW report on Mexico made specific mention of the confusion regarding Mexico's abortion policy.<sup>135</sup> CEDAW reports have also commented on the abortion policies of other Latin American countries and emphasized that the creation of a meaningful abortion policy is directly related to providing citizens access to safe reproductive health options.<sup>136</sup>

130 Dictamen, *supra* note 84, at 20.

131 See *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), (recognizing the "principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child").

132 Dictamen, *supra* 84, at 27 (recognizing that "life in gestation . . . [should] continue receiving the protection of the penal law, [while] at the same time guaranteeing the exercise of the fundamental rights of women").

133 *Id.*

134 Htun, *supra* 14, at 16.

135 *Report on Mexico*, *supra* note 108, at 7.

136 Committee on the Elimination of All Forms of Discrimination against Women ("CEDAW"), 37<sup>th</sup> Sess., Jan. 15–Feb. 2, 2007, *Responses to the list of issues*

Much of the language emerging from the international community has focused on the health consequences of unsafe abortions. This international influence on the Mexican abortion debate can be seen directly in the 2007 Resolution that came before the ALDF, which cited decisions by the Inter-American Court of Human Rights, as well as the language of international organizations and NGOs.<sup>137</sup> This international pressure has helped lead a move away from the absolute protection of the rights of the unborn and towards the protection of the woman's right to health in a modern society that values the "principles of diversity, tolerance and autonomy."<sup>138</sup> Under Article 4 of the Mexican Constitution, individuals are guaranteed equality and liberty.<sup>139</sup> Within the Resolution, however, the ALDF interpreted Article 4 to extend to the protection of a woman's right to reproductive autonomy and health.<sup>140</sup> Indeed, the Resolution noted that the debate on reproduction implicates the rights to life, to health, to equality, to non-discrimination, to liberty, to personal integrity, to freedom from violence, to work, and to education.<sup>141</sup> Furthermore, the focus on health has strong policy purposes in a conservative, Catholic country. As Mala Htun notes in her work on abortion in Latin America, "[F]raming abortion as a question of health is less polarizing and expands the potential constituency supporting change. Legal abortion may cease to be seen as a threat to traditional family values and more as a necessary measure to avert a public health crisis."<sup>142</sup> The legislature of Mexico City, following this international trend, has strongly adopted the language of health to justify the dramatic changes in its abortion law.

Significantly, the Resolution also strongly focused on a new concept of the right of women to engage in some form of family planning, which can also be viewed as an embrace of reproductive liberty. The Resolution notes throughout that women *have the right not to become mothers* and that they have the right to decide in a free, responsible, and informed way the number and spacing of their children.<sup>143</sup> In a historically Catholic city, it is nothing short of

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*and questions with regard to the consideration of the combined fifth and sixth periodic reports: Colombia*, U.N. Doc. CEDAW/C/COL/Q/6/Add.1 (Nov. 6, 2006).

137 Dictamen, *supra* note 84, at 24, 30.

138 *Id.* at 9.

139 *Id.*

140 *Id.*

141 *Id.* at 21.

142 Htun, *supra* note 14, at 43.

143 Dictamen, *supra* note 84, at 9.

historic that a woman's *right* to family planning has become so critical to the debate on gender equality. The right to family planning implies both a right to reproductive liberty (the freedom to make reproductive choices) and sexual liberty (the freedom to decide when and how to engage in intimate sexual relationships).<sup>144</sup> Indeed, much of this language and the extension of the scope of rights have come from the international debate on abortion. The Resolution directly noted that the ALDF was looking to move away from an antiquated concept of gender that reduces a woman to "a simple instrument of reproduction of the human species."<sup>145</sup> The ALDF tapped directly into the suggestions and language of the indicators presented by the UN's Economic and Social Council for creating a robust health care system, noting the obligations of the State in providing information for a woman to make a choice based on her reproductive needs.<sup>146</sup> Additionally, by reforming the punishment component of the Criminal Code to call for 100 to 300 days of community service instead of one to three years in prison, the ALDF also acknowledged that the moral stigma attached to abortion is fading and that making criminals of women who seek abortions goes against both international consensus on the issue and public opinion in Mexico.<sup>147</sup>

The changes to the Health Law were no less influenced by the movements in international human rights than those made to the Criminal Code. The ALDF noted in their Resolution that the government is obligated to "promote the expansion and improvement of programs focusing on sexual and reproductive health, as a suitable instrument to avoid unwanted and unplanned pregnancies . . . so that women make informed and responsible decisions about interrupting their pregnancy."<sup>148</sup> This language is strongly related to wording found in the suggestions of the UN's Economic and Social Council.<sup>149</sup> In creating a plan for providing safe abortions, the ALDF followed the World Health Organization's publication *Safe Abortion: Technical*

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144 See Madrazo & Vela, *supra* note 8 (examining the role of reproductive liberty and sexual liberty in the jurisprudence of the modern Mexican Supreme Court).

145 Dictamen, *supra* note 84, at 23.

146 *Id.* at 10.

147 *Id.* at 6; see also Ananthanarayanan, *supra* note 16, at 32 (demonstrating the growing acceptance of abortion in both Mexico and Mexico City from the late 1990s to the early 2000s).

148 Dictamen, *supra* note 84, at 33.

149 Report of the Special Rapporteur, *supra* note 113.

*and Policy Guidance for Health Systems*.<sup>150</sup> By grounding the rationalization for abortion in the universal language of health, adopted by so many other countries and international organizations, the ALDF created a law that would be much harder for the Supreme Court to strike down when the reforms were inevitably challenged before the highest court.

It should be noted, however, that the anti-abortion activists also have used the international debate to bolster their position. For instance, the United Nations' conferences in Cairo, Beijing and New York (2000) provided a network for Latin American anti-abortion activists to come together and build connections.<sup>151</sup> Groups opposing abortion in the United States have consistently reached out globally to support the cause in other locations.<sup>152</sup> In 1998, quoting the Universal Declaration of Human Rights, the Convention on Children's Rights and the Cairo and Beijing conferences, then-President of Argentina Carlos Menem declared March 25 the "Day of the Unborn Child" to applause from a global network of anti-abortion activists.<sup>153</sup>

The impact of international human rights trends, NGO's and treaties cannot be underestimated on either side of the debate. This influence led to a strong justification for the change in the Criminal Code and the Health Law based on a woman's right to health and family planning, while for anti-abortion activists the human rights language of these agreements only further bolstered their protestations to protect "the unborn."

### 1. The Focus on Access

The changes within the Health Law have been most significant in that they expand real access to abortion and family planning resources in Mexico City. It is in this expansion of access to safe abortions where international influence is most profoundly felt. As noted above, the Robles Law was the first movement toward providing access to legal and safe abortions, but it did so in only four

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150 Dictamen, *supra* note 84, at 34 (citing WHO Dep't of Reproductive Health and Research, *Safe Abortion: Technical and Policy Guidance for Health Systems* 91–92 (2003)).

151 Htun, *supra* note 14, at 16.

152 *Id.*

153 *Id.* at 161–62.

limited cases.<sup>154</sup> The second prong of the Robles Law—requiring doctors in public hospitals to perform abortions—was first promoted by Mexico’s then-Secretary of Health, José Antonio González Fernández, who stated in August 2000 that in cases where abortion was legal, doctors in the public health system must perform abortions.<sup>155</sup> He additionally called for the prosecution of doctors who refused to comply with the law.<sup>156</sup> This demand on public hospitals was eventually worked into a section of the secondary Health Law but only in the limited case of abortions requested after a rape.<sup>157</sup> The changes and additions to the Health Law in 2007, however, greatly expanded the scope of the doctors’ obligations in cases of abortion and also provided for a comprehensive strategy for family planning that would avoid unwanted pregnancies in the future.<sup>158</sup>

It was this new emphasis on the governments’ obligation to provide *access* to what was promised in the law that made these changes so significant. As the language of the Resolution makes clear:

[T]he Legislative Assembly of the Federal District in its exercise of its legal duties, not only has the duty to adopt rules to provide security and legal certainty for citizens, but also must establish additional mechanisms that allow, in this particular case, the administrative organs of public health to attend to this grave public health problem, with full respect for the dignity and the fundamental rights of women.<sup>159</sup>

## B. The Complex Mix of Abortion, Religion and Class

By basing the justification for the reforms on the right to health, the ALDF couched the debate as a necessary protection for women—particularly poor women. This appeal was meant to resonate especially with the largely Catholic population. And

154 See Ananthanarayanan, *supra* note 16, at 14 (listing the four limited cases: where the mother’s life was at risk, where there was forced artificial insemination, where the fetus suffered from a severe genetic defect, and where the pregnancy was the result of rape).

155 See GIRE, *supra* note 7, at 24.

156 *Id.* at 24–25.

157 GODF May 4, 2007, *supra* note 22, at 4; Ananthanarayanan, *supra* 16, at 40–42.

158 GODF May 4, 2007, *supra* note 22, at 2–3.

159 Dictamen, *supra* note 84, at 8.

while public opinion in Mexico City is largely in favor of abortion,<sup>160</sup> the negotiation with religious, conscientiously objecting doctors and nurses—those who actually must perform the abortion—has proven difficult.

### 1. Religion and Conscientious Objectors

The changes to the Health Law also required the ALDF to attempt a balancing act between the needs of the pregnant woman and the interests of the doctor who conscientiously objects to performing abortions because of her religious beliefs.<sup>161</sup> Freedom of religion in Mexico is protected under Articles 6 and 24 of the Mexican constitution.<sup>162</sup> Indeed, many doctors and nurses, especially during the first few weeks after the law passed, felt compelled to reject their duty in favor of their faith.<sup>163</sup>

Religious objection to abortion was no small matter in the debate over requiring doctors to perform abortions. The Catholic clergy in Mexico and world-wide had come out in the days before the vote on the abortion law to call for the ex-communication of politicians who voted in favor of the law.<sup>164</sup> The Archbishops of Mexico City threatened ex-communication for anyone who participated in an abortion.<sup>165</sup> Additionally, the Vatican issued a statement before the

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160 One study found that 74% of those surveyed in Mexico City favored the reforms in 2009, up from 63% in 2008. Significantly for this Article, the study found that from 2008 to 2009 “significant increases occurred in support for improving access to reproductive health services (from 86% to 97%) . . . and the vast majority in 2009 (91%) agreed that the decision should lie with the woman or with the woman and her partner.” Kate S. Wilson, Sandra G. García, Claudia Díaz Olavarrieta, Aremis Villalobos-Hernández, Jorge Valencia Rodríguez, Patricio Sanhueza Smith & Courtney Burks, *Public Opinion On Abortion in Mexico City after the Landmark Reform*, 42 *Stud. Fam. Plan.* 171, 178 (2011).

161 Dictamen, *supra* note 84, at 37-38.

162 *Id.* at 38.

163 See Tobar, *supra* note 3; Elisabeth Malkin & Nacha Cattan, *Mexico City Struggles with Law on Abortion*, *N.Y. Times* (Aug. 24, 2008), <http://www.nytimes.com/2008/08/25/world/americas/25mexico.html?pagewanted=all&r=0>.

164 See *Advierte Iglesia a legisladores: Excomulgarán ‘por normatividad’ a quienes voten a favor de despenalizar el aborto*, *Mural (Mex.)*, Apr. 24, 2007, § 9, at 1; See Malkin & Cattan, *supra* note 163 (noting that the church did not ultimately expel any members of the legislature for his or her vote).

165 Jorge Marirrodriaga, *El Papa amenaza con excomulgar a los políticos católicos que favorezcan el aborto*, *EL Pais (Mex.)* (May 10, 2007), [http://elpais.com/diario/2007/05/10/internacional/1178748015\\_850215.html](http://elpais.com/diario/2007/05/10/internacional/1178748015_850215.html).

vote that abortion, along with gay marriage and euthanasia, was “terrorism with a human face.”<sup>166</sup>

The ALDF sought to deal with the Church’s influence on public hospitals and their employees by reinforcing the reforms made in the Robles law and requiring, in Article 14 Bis 6 of the Health Law, that once again hospitals must have non-objecting doctors on call for abortions.<sup>167</sup> The language of the resolution makes clear that the right to object on religious grounds is not absolute and that the woman’s right to receive the abortion trumps the doctor’s right to object where no non-objecting doctor can be located.<sup>168</sup> To ensure that doctors were performing abortions, Article 14 Bis 3 establishes the Clinical Commission for Evaluation, ensuring that every time a woman requests information about an abortion, it is recorded by an independent, centralized body of the government.<sup>169</sup> Significantly, then-Secretary of Health, Manuel Mondragón y Kalb, under the current Mayor of Mexico City, Marcelo Ebrard, worked to make sure that abortions were readily available to women who sought them before the twelfth week of pregnancy.<sup>170</sup>

There have, of course, been instances of resistance and dissatisfaction with this balancing act among health care professionals in Mexico City. One report noted that 85% of gynecologists in the city’s public hospitals have identified themselves as conscientious objectors.<sup>171</sup> A woman interviewed by the Mexican newspaper, *Reforma*, recounted that when she sought an abortion in the days after the law passed the doctors and nurses who performed her abortion treated her like a leper, with one nurse bemoaning before the abortion, “Mija,<sup>172</sup> this is not the best option, I am a mother of a family and I have children.”<sup>173</sup> Other accounts, however, reflect a

166 *Advierte Iglesia a legisladores, supra* note 164.

167 Dictamen, *supra* note 84, at 37–38.

168 *Id.* at 38.

169 *Id.* at 35.

170 See Tobar, *supra* note 3; Malkin & Cattan, *supra* note 163 (noting that the current Secretary of Health, Dr. Armando Ahued, continues the efforts of his predecessor).

171 See Malkin & Cattan, *supra* note 163.

172 Spanish term of affection; “mija” combines the words “mi hija,” which means “my daughter.”

173 Sergio Fimbres, *Camina segura la ruta del aborto: Cumple joven los trámites de nueva ley. Recurre ciudadana a las recientes reformas para interrumpir su embarazo*, *Reforma* (Mex.), May 3, 2007, § Cuidad y Metrópoli, at 5. These sorts of stories exist throughout Latin America. Ximena Casas relates the story of one woman in Costa Rica who discovered the baby she was carrying

more positive experience. Another woman who had come to Mexico City from Guadalajara<sup>174</sup> for an abortion claimed that, “[A]ll the people in Mexico City gave me a lot of support. The person who did my tests, the nurses, the social workers, the psychologist. . . .”<sup>175</sup> Indeed, one doctor noted that “doctors don’t want to involve themselves in legal questions. Here the majority [of doctors] are against abortion, but we have to abide with the law.”<sup>176</sup> Even the anti-abortion activists realize they are losing the cause in the public hospitals. According to Jorge Serrano Limon, the leader of the National Pro-Life Committee in Mexico, “the pro-abortion current is growing tremendously. At the beginning, there was resistance in the medical community. Now there isn’t any.”<sup>177</sup> Interestingly, 81% of the women who requested abortions in the first month that the procedure was available professed to be Catholic.<sup>178</sup> Both the quickly fading resistance from the medical community, as well as the high number of self-identified Catholics seeking abortions lends weight to the proposition that the reforms in Mexico City could be recreated successfully in other parts of Mexico and across Latin America.

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would be still-born. Although abortion is legal in Costa Rica where the life or health of the woman is threatened (Código Penal [Penal Code] art. 121 (Costa Rica)), this woman was unable to get access to an abortion from the lowest to highest levels of government. At her local hospital, a doctor asked her if the baby was planned. When the woman responded that the pregnancy was unplanned, the doctor retorted, “You should play the lottery to see if you can actually get something right.” The doctor continued, “You should assume the risk of the pregnancy. Although the baby will die, [you] should carry it to term for the full nine months . . . because it is something you did to yourself, and you have to accept God’s will.” Ximena Casas, *Multiple Discrimination in Access to Sexual and Reproductive Health: Experiences from Latin America and the Caribbean*, 65 U. Miami L. Rev. 955, 955–57 (2011).

174 Women from outside of Mexico City are welcome to come to the capital for an abortion. Unlike residents of Mexico City, they must pay a small fee, which is determined on a sliding scale based on financial means. See Manuel Mondragón y Kalb, Armando Ahued Ortega, Jorge Morales Velasquez, Claudia Diaz Olavarrieta, Jorge Valencia Rodríguez, Davida Becker & Sandra G. García, *Patient Characteristics and Service Trends Following Abortion Legalization in Mexico City, 2007-10*, 42 Stud. Fam. Plan. 159 (2011).

175 Tobar, *supra* note 3, at A8.

176 Fimbres, *supra* note 173.

177 Tobar, *supra* note 3.

178 Iván Sosa, *Ofrecen cifras de atenciones: Atiende Salud local durante un mes a mil 347 mujeres interesadas en aborto*, Reforma (Mex.), May 29, 2007, § Cuidad y Metrópoli, at 3.

## 2. The Issue of Class

One of the key reasons the ALDF focused so extensively on the issue of access arose from concerns about the historical pattern of abortion access in Mexico—with only the wealthy possessing *de facto* access to abortion.<sup>179</sup> While all women had theoretical legal access to abortion (in the case of rape) since the codification of the Criminal Code in 1931, only women of the middle and upper classes who could manage to pay for the procedure by a private physician, had real access to abortion (and could be provided one in all circumstances).<sup>180</sup> For those who could not afford the hefty price-tag of a private clinic, the other option was a “back-alley” abortion, an expensive option for many Mexican women but also a surprisingly common choice given the attendant dangers of the procedure.<sup>181</sup> The protections provided in the Health Law were therefore intended to avoid discrimination against poor women, who have had historically limited access to quality health services, especially in the realm of abortion.<sup>182</sup> Indeed, in negotiating Article 15 Bis 5, the Resolution discussed at length the need for abortion services to be provided free of charge.<sup>183</sup> In creating these reforms, the ALDF aimed to close the gap between what services were offered by private physicians and public clinics.<sup>184</sup>

This concern for lower-income women also informed the emphasis on family planning found in Article 14 Bis 2 and Article 16 Bis 8 of the Health Law, which incorporated a new emphasis on access to information about contraceptives and family planning.<sup>185</sup> Article 16 Bis 8 specifically states that, in expanding family services, the law hoped to reduce instances of abortions.<sup>186</sup> Among the free services offered under the law are access to and education about “anti-contraceptive methods whose efficiency and security have been scientifically proven,” as well as medical help and information about family planning to women who seek an “interruption of pregnancy.”<sup>187</sup> The statement by the Secretary of Health, published in the May 4

179 Tobar, *supra* note 3.

180 *Id.*

181 *Id.*

182 Dictamen, *supra* note 84, at 39.

183 *Id.* at 36.

184 *Id.* at 39.

185 *Id.* at 35. See also GODF, 25 de Abril de 2007 (Mex.) at 3 [hereinafter GODF Apr. 25, 2007].

186 GODF Apr. 26, 2007, *supra* note 4, at 3.

187 *Id.*

Gaceta,<sup>188</sup> also lays out a plan for providing family services with the goal of “reducing the number of broken families and [reducing] social injustice, that affects, most of all, women from the least-protected social classes.”<sup>189</sup> The law therefore provides specifically that the target of this legislation is protecting the women most at risk of having illegal and unsafe abortions.

Whether the law—and its focus on access—is truly protecting poor women has been studied since the law went into effect. According to the Secretary of Health, by late May 2007, of the women who had sought abortions in Mexico City, 54% had graduated from high school or technical school, 17% had a bachelor’s degree and less than 1% claimed to be illiterate.<sup>190</sup> A study by the Organization for Economic Cooperation and Development rated Mexico’s high school graduation rates at the very bottom of the twenty-nine richest countries.<sup>191</sup> Therefore, the fact that more than 70% of the women seeking abortions had a high school degree or higher indicates that, at least in the early years following reform, free and legal abortions were likely being accessed by the same class of women who historically had access to abortions. Recent small-scale studies appear to confirm these findings. A study published in the journal, *Studies in Family Planning*, found that between April 2007 to March 2010, among a small, random sample group of women seeking abortions, 40% attended school for nine or fewer years, 39% attended for ten to twelve years, and 21% attended for thirteen years or more.<sup>192</sup> Additionally, 69% were not part of the labor force, but only 6% were unemployed.<sup>193</sup> The rest of that number was made up of homemakers and students.<sup>194</sup> Like earlier studies, this study found that around 80% of all women surveyed reported a Catholic religious affiliation.<sup>195</sup> These statistics are similar to the 2007 studies that occurred directly after the implementation of the reforms, which found that 40% of the

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188 The Gaceta Oficial del Distrito Federal is akin to the Official Reporter for a state court.

189 GODF May 4, 2007, *supra* note 22, at 2.

190 Sosa, *supra* note 178, at 3.

191 Ethan Bronner, *Long a Leader, U.S. Now Lags in High School Graduate Rate*, N.Y. Times (Nov. 24, 1998), <http://www.nytimes.com/1998/11/24/us/long-a-leader-us-now-lags-in-high-school-graduate.html?pagewanted=all&src=pm>.

192 Mondragón y Kalb, et al., *supra* note 174.

193 *Id.*

194 *Id.*

195 *Id.*

women seeking abortions were homemakers, 23% were students and only 35% claimed to be employed.<sup>196</sup> Whether poorer women will begin taking advantage of the newly available access to abortion will be a topic for future study and a critical indicator for other states and countries looking to follow Mexico City's lead. If wealthy women continue to be over-represented in the pool of women seeking abortions, it will be interesting to examine whether that will have an undermining effect on the class rationale for the reformation of the abortion laws. Given that the laws were strongly based on giving low-income women access to safe abortions, usually unavailable on the illegal market, it may indeed be a future challenge to the laws that so few women of that target group are using the newly established abortion services.

### C. Constitutional Consequences

The abortion laws promulgated by the ALDF passed their most significant hurdle when the Supreme Court of Mexico upheld the laws by an eight-to-three vote on August 28, 2008.<sup>197</sup>

The case stemmed from an action by Mexico's Attorney General, the Procuraduría General de la República ("PGR") and the Comisión Nacional de Derechos Humanos ("National Commission for Human Rights" or "CNDH"), a governmental body, who challenged the constitutionality of the reforms one month after the new laws passed.<sup>198</sup> The CNDH, which is the Mexican body for the protection of human rights, objected to the reforms on the ground that they violated the right to life of the unborn, which the CNDH argued was established in Mexico's constitution.<sup>199</sup> In addition, the CNDH contested the changes to the Health Law, which obligated hospitals to perform abortions.<sup>200</sup> Both parties claimed that the ALDF violated the separation of powers in Mexico's constitution with regard to the

196 Sosa, *supra* note 178, at 3.

197 Elisabeth Malkin, *Mexico: City's Abortion Law is Upheld*, N.Y. Times (Aug. 29, 2008), [http://www.nytimes.com/2008/08/29/world/americas/29briefs-CITYSABORTIO\\_BRF.html](http://www.nytimes.com/2008/08/29/world/americas/29briefs-CITYSABORTIO_BRF.html).

198 Ella Grajeda, 'Abortará' Corte ley de salud, anticipan, *El Universal* (Mex.) (Jan. 30, 2008), <http://www.eluniversal.com.mx/ciudad/88744.html>.

199 Tobar, *supra* note 3; Víctor Fuentes, *Pelean aborto al DF: Impugnan ley la PGR y CNDH. Ponen en manos de la Suprema Corte constitucionalidad de la despenalización*, *El Norte* (Mex.), May 26, 2007, Sec. Primera, Vol. 69, Issue 25008.

200 Víctor Fuentes, *Abre Corte audiencias sobre aborto, Reforma* (Mex.), Apr. 1, 2008, § Nacional, at 2.

health law reforms, arguing that Mexico City was attempting to regulate an area of the law that was restricted to the federal government's control.<sup>201</sup>

Recent trends in the Court's jurisprudence, however, set the stage for the Court to uphold the laws. The SCJN, which until major reformation in 1994 was long considered a handmaiden of the executive branch, has slowly begun to gain its independence over the last two decades.<sup>202</sup> Civil law countries have classically been wary of judicial activism, but the increasing independence of the SCJN has allowed it to vote against the executive branch with greater regularity.<sup>203</sup> Furthermore, the decentralization of the Mexican political landscape—from seven decades of one-party rule to competition among parties—has engendered a new respect for federalism within the SCJN.<sup>204</sup> Indeed, as part of a set of judicial reforms in 1994, standing to bring a constitutional controversy, once reserved only for the federation and state governments, was opened up to both the Federal District and local municipalities in order to strengthen federalism in Mexico.<sup>205</sup> In addition, this “upswing has been accompanied by the newfound willingness of the SCJN to proactively provide—in the interest of safeguarding the well-being of the people (*el “bienestar de la persona humana”*)—meaningful guidance with respect to a seemingly unlimited range of contemporary political, commercial, and social issues.”<sup>206</sup> This means that the Court has not only tackled abortion issues in the past (in the challenge to the Robles Law to be discussed below), but also a number of human rights cases that had once been off-limits.<sup>207</sup> In recent years the Court has been “reshaping law and legal culture in Mexico” by vastly expanding the scope of sexual liberty in the country.<sup>208</sup>

The SCJN had previously confronted the abortion issue in 2000 when the Robles laws passed. In that case, the PAN and the

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201 Grajeda, *supra* note 198.

202 Kossick, *supra* note 49, at 750.

203 *Id.* at 764.

204 Domínguez, *supra* note 59.

205 Kossick, *supra* note 49, at 766.

206 *Id.* at 768.

207 *Id.* at 768–70.

208 See Madrazo & Vela, *supra* note 8 (noting that the Mexican Supreme Court has in recent years upheld Mexico City's reform to allow gay marriage, prohibited conjugal rape for the first time in Mexican history, and affirmed the right of every citizen to have sexual reassignment surgery if he or she chooses a legal sex change).

Partido Verde Ecologista de México (“Green Party” or “PVEM”) challenged the addition of the fetal impairment exception to the list of circumstances in which abortion would be legal.<sup>209</sup> They also challenged the procedure for authorizing abortions in cases of rape.<sup>210</sup> Both challenges were based on the ground that abortion violated Mexico’s right to the preservation of life, which protects life starting at conception.<sup>211</sup> In January 2002, the Court handed down two decisions addressing the challenges.<sup>212</sup> The Court upheld the fetal impairment exception by a vote of seven to four, but found, even in upholding the law, that abortion was a crime against human life.<sup>213</sup> The Court additionally failed to gain the eight votes necessary to strike down the provision that granted the Public Ministry authority to authorize abortions in cases of rape and therefore that was also upheld.<sup>214</sup>

Still, it was not entirely clear how the Court would vote on this recent challenge until its decision was released.<sup>215</sup> At the time, the bench was equally split between judges who were characterized as more “traditional” and those who fell into the “liberal” wing, with two judges, Maragarita Luna Ramos and Olga Sánchez Cordero, generally labeled as “centrist” swing votes.<sup>216</sup> Throughout the process, the ALDF and many Mexican feminist groups remained confident that the Court would find in their favor.<sup>217</sup> Although the Court had never actively come out in support of abortion, their pattern of past decisions suggested it would continue to uphold abortion.

209 Ananthanarayanan, *supra* note 16, at 33–34 (referencing the Acción de inconstitucionalidad en contra del Código Penal y del Código de Procedimientos Penales para el Distrito Federal (Action of unconstitutionality against the Penal Code and the Code of Penal Procedures for the Federal District), ALDF, GODF, 25 Septiembre 2000, at 4).

210 *Id.*

211 *Id.* at 34.

212 *Id.*

213 *Id.*

214 Ananthanarayanan, *supra* note 16, at 33–34.

215 Miguel Carbonell, *El año de la Corte*, El Universal, (Mex.) (Jan. 11, 2008), <http://www.eluniversal.com.mx/editoriales/39454.html>.

216 *Id.*

217 Mónica Archundia & Ella Grajeda, *GDF ve seguro ganar juicio sobre aborto*, El Universal (Mex.) (Jan. 31, 2008), <http://www.eluniversal.com.mx/ciudad/88768.html>; Claudia Balaños, *Confían en que Corte no frene la despenalización del aborto*, El Universal (Mex.) (Feb. 4, 2008), <http://www.eluniversal.com.mx/ciudad/88809.html>.

Indeed, that is just what the court did on August 28, 2008 when it held that the creation of the contested laws and punishments was outside the scope of the Court's authority and declared that Mexico City was constitutionally permitted to promulgate its own abortion laws.<sup>218</sup> As María Luisa Sánchez, the Director of GIRE, noted before the decision was released, it would be very difficult for the Court to resist a law that protects both women and their health.<sup>219</sup>

#### IV. THE FUTURE OF ABORTION RIGHTS IN MEXICO AND BEYOND

The impact of the abortion revolution in Mexico City on the rest of the country and Latin America continues to evolve. The Supreme Court's ruling and newfound respect for states' rights opens the door to other Mexican states passing similar abortion laws as those passed in Mexico City. In the aftermath of the reforms, many pro-life activists feared a trend towards liberalization would become the norm throughout Mexico. However, the opposite development has emerged.<sup>220</sup> Across Mexico, states are adopting "fetal-rights" constitutional amendments, which legally protect life from the "moment of conception."<sup>221</sup> By the end of 2009, sixteen states had passed versions of the fetal-rights amendment.<sup>222</sup> These amendments passed despite studies showing very low awareness in many of those states of government efforts to change the legal status of abortion.<sup>223</sup> Although support for elective abortion without restrictions remains low outside of Mexico City, most Mexicans surveyed in a study of eight Mexican states believe that abortions should be permitted in certain circumstances, particularly where the woman's life is at risk

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218 Suprema Corte de Justicia de la Nación, *Constitucional, Norma De ALDF Que Despenaliza el Aborto en DF hasta la Semana 12 de Gestación*, No. 205/2008, Aug. 28, 2008, available at [http://informa.scjn.gob.mx/constitucional\\_norma\\_de\\_aldf\\_que\\_despenaliza\\_el\\_a.html](http://informa.scjn.gob.mx/constitucional_norma_de_aldf_que_despenaliza_el_a.html).

219 Balaños, *supra* note 217.

220 Mary Cuddehe, *Mexico's Anti-Abortion Backlash*, *The Nation* (Jan. 4, 2012), <http://www.thenation.com/article/165436/mexicos-anti-abortion-backlash>.

221 *Id.*

222 *Id.*

223 Jorge Valencia Rodríguez, Kate S. Wilson, Claudia Díaz Olavarrieta, Sandra G. García & María Luisa Sánchez Fuentes, *Public Opinion on Abortion in Eight Mexican States amid Opposition to Legalization*, 42 *Stud. Fam. Plan.* 191, 193 (2011). The eight states surveyed in this study are Baja California, Colima, Morelos, Sonora, Queretaro, the State of Mexico, Tabasco, and Veracruz.. *Id.* at 194.

from the pregnancy or in cases of rape.<sup>224</sup> The constitutional amendments popping up across much of Mexico appear not to reflect the full range of views of its citizens.<sup>225</sup> Codification of constitutional amendments in these states, however, does not bode well for liberalization of abortion laws in the near future in other parts of Mexico.<sup>226</sup>

It is also unclear, at this point, that changes in Mexico will generally affect other Latin American countries, which tend to have much more centralized legal and political systems.<sup>227</sup> Some countries have recently begun to allow some liberalization of abortion laws. Colombia, for instance, which had once banned abortion entirely, loosened their laws slightly in 2006.<sup>228</sup> In October 2012, Uruguay followed Mexico City's lead by legalizing first-trimester abortions for all women.<sup>229</sup> This came after years of clashes over the issue. In 2008, Uruguay came very close to decriminalizing all abortions before the twelfth week of pregnancy when both houses of Congress passed the Sexual Health and Reproduction Law.<sup>230</sup> The President, however, vetoed the bill at the last moment, saying that pregnant women needed support, not abortions.<sup>231</sup> Notwithstanding the 2008 presidential veto, Uruguay remained one of the most liberal countries in Latin America.<sup>232</sup> It was the first to legalize divorce and to grant women the vote.<sup>233</sup> Polls indicated that 57% of Uruguayans were in

224 *Id.* at 193.

225 *Id.* at 196.

226 Interestingly, Mexican public opinion, even outside of Mexico City, tends to favor legal abortion under certain circumstances. Additionally, "a significant proportion of the population supports the legalization of elective abortion within the first 12 weeks of gestation." Valencia Rodríguez, et. al., *supra* note 160, at 191–97.

227 Domínguez, *supra* note 58.

228 *Breaking a Taboo, supra* note 27.

229 Michael Warren, *Uruguay Takes Historic Step Legalizing Abortion*, Star-Telegram (Oct. 17, 2012), <http://www.star-telegram.com/2012/10/16/4340871/uruguay-senate-prepares-for-final.html>.

230 Jeremy McDermott, *Uruguay's President Tabare Vasquez Resigns from Socialist Party Over Abortion Vote*, Daily Telegraph (London) (Dec. 5, 2008) <http://www.telegraph.co.uk/news/worldnews/southamerica/uruguay/3568036/Uruguay-Resigns-From-Socialist-Party-Over-Abortion-Vote.html>.

231 *Id.*

232 Andrzej Kulczycki, *Abortion in Latin America: Changes in Practice, Growing Conflict, and Recent Policy Developments*, 42 *Stud. Fam. Plan.* 199, 209 (2011).

233 *Id.*

favor of legalizing abortion.<sup>234</sup> And, interestingly, although Uruguay officially prohibited abortion in nearly all circumstances until recently, in the mid-2000s it experimented with and then passed as law, the *Iniciativas Sanitarias contra el Aborto Provocado en Condiciones de Riesgo* (“Health Initiatives Against Unsafe Abortion”).<sup>235</sup> The law allows physicians to provide women who are not eligible to receive legal abortions with information on safer methods of non-legal abortion.<sup>236</sup> This includes evidence-based information on different forms of abortion that can be self-induced and their appropriate administration, effectiveness, and associated risks.<sup>237</sup> The law provides a “means to act on unsafe abortion without engaging the law on abortion.”<sup>238</sup> The law is also effective. Uruguay has one of the lowest maternal mortality ratios (27 per 100,000 live births) in South America.<sup>239</sup>

And the Health Initiatives against Unsafe Abortion law may continue to be necessary to protect the health of women, even as abortion legalization is enacted in Uruguay. The new law comes with a series of “strings” that may make implementation cumbersome and inefficient.<sup>240</sup> For instance, the law requires the woman seeking the abortion to meet with a panel consisting of a gynecologist, a mental health expert, and a social worker.<sup>241</sup> First, the panel questions the woman about the reasons she is choosing to terminate her pregnancy.<sup>242</sup> Second, it informs the woman of the risks of an abortion and counsels her on potential alternatives, like adoption.<sup>243</sup> The woman must then wait five days after this session to obtain the abortion.<sup>244</sup> As in Mexico City, the law incorporates a conscientious objection exemption for health care providers, and similarly requires that hospitals then provide a woman with an alternate provider, who will perform the abortion.<sup>245</sup> The law also decriminalizes late-term

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234 McDermott, *supra* note 230.

235 Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 Harv. J.L. & Gender 413, 417–22 (2011).

236 *Id.* at 414.

237 *Id.* at 421.

238 *Id.* at 424.

239 Kulcycki, *supra* note 232, at 209.

240 Warren, *supra* note 229.

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.*

245 *Id.*

abortions and gives rape victims up to fourteen weeks to procure a legal abortion.<sup>246</sup> It is too early to know what sort of effect the law will have or whether it will withstand constitutional challenges, but, despite its flaws, it is a rare step towards reproductive liberty in Latin America.

Other countries, however, have been headed in the opposite direction. In 2007 Nicaragua incorporated a ban on the last remaining exception to the general prohibition on abortion, which allowed abortions where a woman's life was at risk.<sup>247</sup> In short order, Nicaragua, which had permitted these so-called "therapeutic abortions" since 1893, witnessed the deaths of ninety women who were denied abortions after it became clear that their pregnancies had put their lives at risk.<sup>248</sup> Indeed, where the procedure was once common, with 800 to 1,000 abortions performed each year, doctors are now terrified to perform them and risk exposure to stiff penalties—a one to three year prison term and loss of their medical license for two to five years.<sup>249</sup> A woman who has a self-induced abortion risks one to two years in prison.<sup>250</sup> It is estimated that there are 30,000 clandestine abortions performed each year in Nicaragua and that girls eighteen years old and younger likely account for 40% of rural maternal deaths.<sup>251</sup> The situation in Nicaragua confirms the highly influential role of the Catholic Church in abortion debates in Latin America.<sup>252</sup> In courting the Church's support, political candidates of all leanings feel compelled to come out against abortion.<sup>253</sup> In Nicaragua this desire to please the Church has taken its most extreme form.

The widespread criminalization of abortion does little, if anything, to prevent actual abortions. Interestingly, a recent article proposes that even liberalized abortion laws may also have limited preventative value where the implementation of the law is not clearly

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246 *Id.*

247 Jocelyn Getgen, *Reproductive Injustice: An Analysis of Nicaragua's Complete Abortion Ban*, 41 *Cornell Int'l L. J.* 143, 151 (2008); Jose Silva, *Nicaragua: At-Risk Pregnancy Means Death or Prison*, Inter Press Service (Oct. 31, 2007), available at <http://www.ipsnews.net/2007/10/nicaragua-at-risk-pregnancy-means-death-or-prison/>.

248 Silva, *supra* note 247.

249 *Id.*

250 *Id.*

251 Kulczycki, *supra* note 232, at 212 (citations omitted).

252 *Id.*

253 *Id.*

defined.<sup>254</sup> In her article, *The Limits of Reproductive Rights in Improving Women's Health*, Rachel Rebouché examines the case of South Africa, which has had a progressive abortion statute on the books since 1997. That statute, the Choice on Termination of Pregnancy Act ("CTOPA"), parallels the Mexico City abortion laws in a number of critical ways. It allows a woman to request a legal abortion for any reason within the first twelve weeks of pregnancy. It survived early challenges to its constitutionality. And it was developed with a human rights framework in mind. The language of the CTOPA, much like that of the reforms in Mexico, incorporates explicit "right to health" and "reproductive liberty" language. The preamble of the statute reads, in part, that "every woman [has] the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs."<sup>255</sup>

And yet, studies of abortion rates in South Africa indicate that the rates of unsafe abortions are not necessarily decreasing.<sup>256</sup> According to Rebouché, "studies from 2000 and 2009 suggest a fairly constant rate of illegal abortion—terminations performed outside of the designated facilities or by unapproved persons."<sup>257</sup> Rebouché suspects a number of culprits in this trend, including the continued stigma attached to abortion in South Africa, but she also posits that a lack of guidance about implementation of the legislation may be a large part of the problem.<sup>258</sup> She points particularly to the silence in the statute about the issue of potential refusal by health care providers.<sup>259</sup> Although there was "lively debate" about a refusal clause, none was included in the final version.<sup>260</sup> As a result, implementation of the CTOPA is severely restricted by a lack of cooperation in the public health community.<sup>261</sup>

The example of South Africa lays out the troubling possibility that even a carefully crafted piece of abortion legislation based on a human rights framework may mean little for those women on the

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254 Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women's Health*, 63 Ala. L. Rev. 1, 1–2 (2011).

255 *Id.* at 2 (quoting the Choice on Termination of Pregnancy Act of 1996 (S. Afr.), pmbll., amended by Choice on Termination of Pregnancy Act 1 of 2008 (S. Afr.)).

256 *Id.* at 26.

257 *Id.* at 26–27.

258 *Id.*

259 *Id.* at 27–30.

260 *Id.* at 28.

261 *Id.* at 29.

ground seeking safe and legal abortions. But it also offers some clear contrasts to the model in Mexico City, which appears to be working even in the face of challenges. Certainly debates about culture and history weigh into this examination, but a comparison between the two models of legislation indicate that a clear focus on implementation—and access—may be the key to producing a workable template for abortion laws.

According to a study by the World Health Organization and the Alan Guttmacher Institute research group, Latin America has the highest abortion rate in the world.<sup>262</sup> The vast majority of these abortions are done in dangerous and unsafe ways that lead to the deaths of tens of thousands of Latin American women each year.<sup>263</sup> As Mexico City's model continues to save women's lives (while the Nicaragua model leads to more unnecessary deaths), perhaps what the Mexico City experiment will provide is a meaningful framework for crafting an abortion law that takes into account multiple perspectives and concerns. By relying heavily on international human rights trends and treaties to justify a law that focuses on women's health, especially the health of women who have been historically at risk for unsafe abortions, and additionally by making access to abortion a *de facto* reality and not merely a *de jure* note in the law books, Mexico City has created a system that goes far toward stemming the tide of deadly, illegal abortions that plague Latin America.

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262 Chang, *supra* note 12.

263 *Id.*